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*In the New York Court of Appeals.*BENJAMIN GOULD, RESP., vs. THE TOWN OF STERLING, APPEL'T.¹

By the provisions of a statute, the Supervisor and Commissioners of the town of S. were authorized to borrow a sum of money, not exceeding twenty-five thousand dollars, upon the credit of the town, and to execute therefor, under their official signatures, a bond or bonds. They were to have no power to do any of the acts authorized by the statute until the written assent of two-thirds of the resident tax-payers was obtained and filed in the office of the County Clerk. The money, when obtained, was directed to be paid over to the president and directors of a railroad company then about to be organized for the construction of a railroad through the town. Instead of borrowing the money, the Supervisor and Commissioners executed and delivered the bonds directly to the railroad company in payment for stock for which they were authorized to subscribe, and these were subsequently sold by the company at a discount. Each of the bonds, upon which the plaintiff brought his action, stated that the requisite consent of the tax-payers had been obtained and properly filed, with a certificate of the County Clerk that a paper, purporting to be the written assent, &c., had been filed in his office. The statute did not authorize the giving of this certificate, nor did it prescribe in what method the written assent should be proved. No evidence was offered that the consent had been given other than what is above stated. The bonds on which the suit was brought were payable to bearer, and the plaintiff was a holder for value.

- 1 *Held*, that the power to borrow was not properly complied with.
2. That the provision requiring the assent of the tax-payers, as evidenced, was a condition precedent to the issue of the bonds, and an indispensable prerequisite to their validity.
3. That, in the absence of all direct proof that the written assent had been obtained, the town was not estopped by the acts of its agents, who had issued bonds asserting upon their face that it had been, even though it had, for a considerable period, acquiesced in their acts. Such consent should have been proved affirmatively. The case does not come within the rule that when a power is conferred, if the agent does an act which is *apparently* within the terms of the power, the principal is bound by the representation of the agent as to the existence of any *extrinsic* facts essential to the proper exercise of the power where such facts, from their nature, rest *peculiarly* within the knowledge of the agent. The defect consists in the existence of the power itself, and if it did not, the facts requisite to the validity of the bonds being created by statute, were not peculiarly within the knowledge of the town.

¹ We are indebted to the courtesy of Mr. Ch. Judge Selden, for the following opinion, for which he will accept our thanks.—*Eds. A. L. Reg.*

The fact that the bonds were negotiable, and purchased for value without notice of the defect, does not, under such circumstances, aid the plaintiff.

The opinion of the court was delivered by

SELDEN, Ch. J.—The bonds or obligations upon which this action was brought, purported to have been issued by the Supervisor and Railroad Commissioners of the town of Sterling, pursuant to sec. 1 of the act of June 22, 1851, authorizing these officers, under certain circumstances, to execute such bonds. Several objections were made, upon the trial, to their validity. The statute authorized the Supervisor and Commissioners “to borrow” a sum not exceeding twenty-five thousand dollars, upon the credit of the town, and “to execute therefor, under their official signatures, a bond or bonds,” &c. The money, when obtained, was directed to be *paid over* to the president and directors of a railroad company then about to be organized for the construction of a railroad through the said town, “to be expended by them in grading and constructing” such road.

Instead of *borrowing* the money, the Supervisor and Commissioners executed and delivered the bonds in question directly to the railroad company in payment for stock for which they were authorized by the act to subscribe, and they were subsequently sold by the company at a discount. The question is, whether this was within the authority conferred by the act? It is clearly not within its language. No money was borrowed, and nothing else was authorized by the *terms* of this act. If, however, what was done was the same *in effect*, as if the money had been borrowed and paid over to the railroad company, the difference in form would not be material. But it is plain that, neither in respect to the railroad company or the town, was its effect the same. If the statute had been pursued, the company would have had a sum equal to the par value of the bonds to expend upon their work. As it was, they were compelled to sell the bonds at a discount, in order to realize the money.

If the railroad company could sell at a discount at all, it could of course sell at any sacrifice, however great. The bonds of the town of Sterling for twenty-five thousand dollars might have been

sold for ten thousand. Can it be supposed that if such a power had been specifically asked of the legislature, the request would have been granted? Would the town have been permitted to incur a debt, to be paid by taxation upon its inhabitants, of twenty-five thousand dollars, for the sake of furnishing the railroad company with ten thousand to be expended upon its works? I think not; and yet this is, *in effect*, the power which it is claimed was conferred by the act authorizing the town to borrow. The rate of discount, whether more or less, can make no difference with the principle.

Had the town itself made the sale, and paid over the avails to the railroad company, it seems to me entirely clear that the transaction would have been illegal. It is usual for the legislature, when conferring upon a municipal or other corporate body the power to raise money upon the faith and credit of the corporation, to guard against such a sacrifice. An example of this may be seen by referring to the act amending the charter of the city of Rochester, passed July 3, 1851. By sec. 12 of that act, the Common Council were authorized to create a public stock not exceeding thirty thousand dollars, to be applied to the erection of a City Hall, and for that purpose to issue bonds or certificates in the usual form. They were also authorized to sell and dispose of such bonds or certificates "upon such terms" as they should deem most advantageous to the city, "but not for less than par." By sec. 285 of the amendatory act, power was also conferred upon the Common Council to borrow, upon the faith and credit of the city, a sum not exceeding three hundred thousand dollars, at a rate of interest not exceeding seven per cent., and to issue bonds therefor; and, by sec. 286, they were authorized to sell and dispose of such bonds upon such terms as they might deem most advantageous, and to invest the proceeds in the Genesee Valley Railroad Company; but they were expressly prohibited from selling them for less than par.

The reason why such a prohibition was not inserted in the act under consideration, can be readily seen. By each of the sections of the act amending the charter of the city of Rochester, to which I have referred, the Common Council were expressly authorized *to sell* the bonds, and hence the necessity for the restriction. In the

present case the only authority given by the act is *to borrow* upon the bonds of the town. No express power to sell the bonds is given, and no such power can be implied. To borrow money, and give a bond or obligation for it, and to sell a bond or obligation for money, are by no means identical transactions. In the one case, the money and the bond would, of course, be equal in amount. In the other, they might or might not be equal. Hence, a mere authority to a corporation *to borrow* money upon its bonds, is equivalent *ex vi termini* to an authority to dispose of its bonds *at par*, and no further restriction is necessary.

But it is true, the town did not itself sell the bonds, or make any sacrifice upon them. It transferred them to the railroad company *at par* in payment of stock for which it was authorized to subscribe. This, however, in my view, does not strengthen the plaintiff's case. It was as much a departure from *the terms* of the statute, as if the town had itself sold the bonds at a discount, and was equally inconsistent with its object and intent, which was, that the railroad company should receive a sum equal to the amount of the debt incurred by the town to expend upon the road, in the completion of which the town was supposed to have an interest. It is a well-settled and salutary rule in respect to every statutory authority of this kind, that the statute must be strictly pursued. In this case there is not only a literal but a substantial difference between the course pursued and that pointed out by the statute. It follows that the bonds were illegally issued, and were consequently void in the hands of the railroad company; and as the referee has expressly found that the plaintiff became the purchaser with full knowledge that the bonds had not been issued for money borrowed, but in payment for the stock of the company, he is in no better situation than the railroad company itself.

There is another objection which is equally fatal to the validity of the bonds. Sec. 1, of the Act of 1851, after conferring upon the Supervisor and Railroad Commissioners power to issue the bonds, concludes with a proviso to the effect, that these officers should have no power to do any of the acts authorized by the statute until "the written assent of two-thirds of the resident per-

sons taxed" in the town, as appearing upon the last assessment roll, should have been obtained and filed in the Clerk's office of Cayuga County. Each of the bonds upon which the action was brought, stated upon its face that the requisite assent had been obtained and filed, and to each was attached a certificate in the following words: "Cayuga County, Clerk's Office, ss: I, Edwin B. Morgan, Clerk of the County of Cayuga, hereby certify, that a paper purporting to be the written assent of two-thirds of the resident tax-payers of the town of Sterling, with the affidavit required by sec. 1 of the Act referred to by its title in the foregoing bond, has been filed in this office."

The statute did not authorize the giving of any such certificate, nor did it provide for the filing of any affidavit, or prescribe in any manner the evidence by which the written assent should be established. The paper referred to in the certificate was also produced from the files of the Clerk's office, with a number of names attached. This paper, together with the certificate, was read in evidence under objection by the defendant's counsel. No evidence was given or offered of the genuineness of the signatures; nor that the subscribers were non-resident tax-payers of the town of Sterling; nor that the persons whose names were appended, if tax-payers, would constitute two-thirds of the whole number. The defendant's counsel moved for a non-suit for want of such evidence, and the motion was denied.

It was not contended upon the argument, if the obtaining of the written assent of two-thirds of the tax-payers pursuant to the statute is to be regarded as an indispensable pre-requisite to the exercise of the power to issue the bonds, that the evidence was sufficient under the ordinary rules of evidence to establish the fact. But it was claimed on the part of the plaintiff,

1. That the provision in regard to the consent of the tax-payers was not intended as a condition precedent, but merely as directory to the Supervisor and Commissioners; and that whenever those officers were satisfied that such consent had been given, they had power to act.

- 2 That the town was estopped by the acts of its agents, in

executing bonds, asserting upon their face that the requisite assent had been obtained and filed, and negotiating these bonds with the certificate of the County Clerk annexed; especially after having acquiesced for a considerable time in such acts.

3. That the bonds are negotiable instruments, and that the plaintiff is a *bona fide* holder without notice of the defect.

The first of these positions is obviously untenable. It is quite impossible to construe the proviso in the statute as embracing a mere direction to the officers upon whom the authority is conferred. It was plainly intended to make the obtaining of the assent of the tax-payers a condition precedent to the exercise of the power. Its words are: "Provided always that the said Supervisor and Commissioners *shall have no power* to do any of the acts authorized by the act until, &c." This admits of but one interpretation. It would be impossible to create a condition by language more explicit. The want of proof, therefore, that this condition had been complied with must be fatal to the recovery, unless the plaintiff is protected as a *bona fide* purchaser, or can maintain his position that the town is estopped.

The estoppel contended for is supposed to result from that rule of the law of principal and agent pursuant to which it is held, that when a power is conferred, if the agent does an act, which is *apparently* within the terms of the power, the principal is bound by the representation of the agent, as to the existence of any *extrinsic* facts, essential to the proper exercise of the power, where such facts from their nature rest *peculiarly* within the knowledge of the agent. This is the doctrine asserted in the case of *Farmers' and Mechanics' Bank vs. Butchers' and Drovers' Bank*, 16 N. L. R. 137. No representation of the agent as to *the fact of his agency*, or as to the *extent of his power*, is of any force to charge the principal. But it being shown by other evidence that the agency existed, and that the act done is within the general scope of the power, the principal is bound by the representation of the agent as to any essential facts known to the agent, but which the party dealing with him had no certain means of ascertaining.

The reason upon which that rule is founded is that given by

Lord Holt, in *Hern vs. Nichols*, 1 Salk. 289, viz.: that where one of two innocent parties must suffer through the misconduct of another, it is reasonable that he who has employed the delinquent party, and thus held him out to the world as worthy of confidence, should be the loser. This reason can, of course, only apply to a case where the principal has *himself* employed the agent, and voluntarily conferred upon him power to do the act. This clearly is not such a case. The agents here were designated not by the town, but by the legislature; and no power whatever was conferred by the town, unless the assent of the tax-payers was obtained. Any representation therefore by the Supervisor and Commissioners in respect to such assent, would be a representation as to the very existence of their power. Such representations as we have seen are never binding upon the principal. It is obvious, therefore, that the doctrine of the case of the *Farmers' and Mechanics' Bank vs. The Butchers' and Drovers' Bank*, has no application to the present case. It is also inapplicable for another reason. Knowledge of the facts in regard to the assent of the tax-payers was in no manner peculiar to the Supervisor and Commissioners, but was equally accessible to the parties receiving the bonds. The statute, of which they were bound to take notice, apprised them, that the bonds could not be legally issued until the requisite assent was obtained, and also that the assent when obtained would be placed upon the files of the County, to which all persons had access. The case is not therefore at all like that of the *Butchers' and Drovers' Bank*, where the extrinsic fact related to the state of the accounts of the bank with one of its customers, which could only be known to the teller and other officers of the bank. Here the parties who received the bonds, had the means of ascertaining, and were bound to inquire as to the existence of the facts, upon which, as they knew, the validity of the bonds depended. (*Note 1.*)

The negotiability of the bonds in no manner aids the plaintiff. It is true they are negotiable, and have in this respect most if not all the attributes of commercial paper, (*Note 2.*) But one who takes a negotiable promissory note or bill of exchange, purporting to be

made by an agent, is bound to inquire as to the power of the agent. Where the agent is appointed and the power conferred, but the right to exercise the power has been made to depend upon the existence of facts, of which the agent may naturally be supposed to be in an especial manner cognisant, the *bona fide* holder is protected; because he is presumed to have taken the paper upon the faith of the representation of the agent as to those facts. The mere act of executing the note or bill amounts of itself in such a case to a representation by the agent, to every person who may take the paper that the requisite facts exist. But the holder has no such protection in regard to the existence and nature of the power itself. In that respect, the subsequent *bona fide* holder is in no better situation than the payee, except in so far as the latter would appear of necessity to have had cognisance of facts, which the other cannot be presumed to have known.

There is an obvious distinction between this case and that of the *State of Illinois vs. Delafield*, 8 Paige, 527. There the *State* was the party to be bound, and the State had by law appointed certain officers its agents, and conferred upon them power to execute and negotiate its bonds. The difficulty consisted in the irregular and unauthorized manner in which the power was executed, not in the creation of the power itself. The distinction is as plain as that between conditions precedent and subsequent in general.

It follows from these principles, that until it was shown that the written assent of the required number of tax-payers had been obtained pursuant to the act, there could be no recovery upon the bonds. The judgment of the Supreme Court must be reversed, and there must be a new trial with costs to abide the event.

Note 1. The very important question raised in this case as to the power of an agent to bind his principal by his representations, is not yet so definitely adjudicated that any conclusions can be considered as commanding general assent. A review of the positions established by the principal decisions upon the subject may not be unprofitable.

I. It seems entirely clear that no representations by an agent can ever establish the fact of agency. This proposition is true without qualification, both at law and in equity. If a person, who is not in fact authorized, represents that he has power to execute a promissory note for another, the instrument, so far as the supposed principal is con

cerned, is utterly void. The negotiability of the note will have no effect upon the question, as the inquiry turns upon the existence of the note itself. The term "negotiability," pre-supposes the existence of an instrument made by a person having *capacity* or *power* to contract in that particular manner. Instruments made by infants, married women, insane persons, or others without capacity to make binding contracts, gain no additional validity because they may assume the form of negotiable paper. It is entirely immaterial whether the incapacity or want of power is general, or extends only to the particular act in controversy. For similar reasons, an agent can no more enlarge his powers by means of unauthorized representations than he can create them. *New York Life Insurance and Trust Co. vs. Beebe*, 3 Selden, 364.

II. The inquiry then must be confined to the question, what has the *principal said or done* which bears upon the supposed agency? If the power cannot be derived from his representations or acts, it cannot exist at all. In analyzing the acts of the principal, there appear to be only two grounds on which he can be held liable for the representations of his agent: 1. That of identity; 2. That of estoppel.

1. When it is sought to charge the principal on the ground of his identity with the agent, it must appear that he has distinctly authorized the very act in question. If the authority is written, it is purely a question of construction; if oral, and every element of estoppel is absent, it is still necessary to investigate the precise authority conferred. Every act transcending the exact limits of the power granted, is inoperative and void.

2. The difficulty of the case arises when it is sought to apply the doctrine

of estoppel to the law of agency. The inquiry then is, when shall the principal be held liable, though he has not authorized, or perhaps when he has expressly forbidden the act in question? It is apparent that the ground of identity here wholly fails. The agent is not the instrument of the principal. Notwithstanding this, the principal may be liable.

The true ground on this subject must be, that the principal may be liable for the acts of the agent when he exercises an employment which, by well-established usage, confers upon him certain powers, or when the authority, in form or in terms, includes the act in question. In these cases, the principal may be bound to third persons, though the agent did an unauthorized act, provided they had a right to act, and did in fact act, upon the understanding that the agent was authorized to proceed in the particular case. In the first class of cases, the authority given by usage *must be measured by the usage*. It cannot exceed this by a hair's breadth. The only inquiry is as to its exact limits and extent. This point is well illustrated by the familiar rule, that, by the usage of trade, a factor has a power to sell on credit. This he may do (contrary to express instructions from the principal) to an honest purchaser. But, as usage gives him no power to pledge goods, he cannot, in the absence of a statute, confer upon an honest pledgee a right to retain them for advances actually made. It is conceived that, upon this ground, the noted case of *Grant vs. Norway*, 10 C. B. 664, is best sustained. In this case, the master of a ship having the power conferred *by usage* to sign bills of lading for goods placed on board of his ship for transportation, executed fictitious bills of lading. It was held, that though these passed into the hands of *bonâ fide* assignees, they could not sue the owner for the deceit. The

action was on the case for deceit. The power to sign bills of lading was *not given* "directly by the owner, but by commercial usage." The authority of the master could not be extended beyond such usage. The opinion of the Court evidently rests solely upon this ground. Says the Court: "The authority of the master of a ship is very large, and extends to all acts that are usual and necessary for the use and enjoyment of the ship. So with regard to goods put on board, he may sign a bill of lading, and acknowledge the nature, quality, and condition of the goods. Constant usage *shows* that masters have that general authority; and if a more limited one is given, a party not informed of it is not affected by such limitation."

"*Is it then usual*, in the management of a ship carrying goods for freight, for the master to give a bill of lading for goods not put on board? For all parties concerned have a right to assume that an agent has authority to do all which is usual." After showing that it was not usual to sign such bills, the Court proceeds: "If then, from the usage of trade and the general practice of shipmasters, it is generally known that the master derives no such authority from his position of master, the case may be considered as if the party taking the bill of lading had notice of an express limitation of his authority." Pp. 686-7-8. This case is then authority simply for the proposition that, when an effort is made to bind the principal by the usages of trade, the authority is *to be limited* by the usage as well as created by it. In this point of view, it is impossible to doubt the soundness of the decision. It has often been cited, however, as establishing another and quite a different doctrine. But the statement of the case shows that the turning point must have been the proper construction to be given to a well settled usage. Precisely the

same view must be taken of the case of *Freeman vs. Buckingham*, 18 How. U. S. 182. The charterer of a ship, by a fraud, induced the master to sign fictitious bills of lading, and the question here was as to the usage. The Court make the decision rest upon a similar ground, citing with approbation the case of *Grant vs. Norway*, although the reasons upon which that decision rests were not presented with entire fulness. See also *Walter vs. Brewer*, 11 Mass. 99.

If we now examine the second class of cases we shall find no such accurate limitation of authority, as where the extent of a usage is in question. It is evident that the principal may, if he sees fit, bestow an unlimited authority. The inquiry then must be, what is the legitimate inference to be drawn from the statements or acts of the principal, as viewed by one who gives credit to them in good faith? The inference may be derived from a series of recognitions of the agent's act or from direct employment. It is believed that the following principles are applicable. 1. The authority or employment must, *in form* or apparently, include the act in question. If this were not so, we should be led to the conclusion that an agent might establish an agency by his own representations. 2. The acts or representations of the agent must naturally lead to the conclusion, that the supposed authority does exist. In other words, he must, in substance, affirm that the act in question forms *no exception* to the general delegation of authority. Such an affirmation is not to be regarded as creating an agency, but simply as an assertion that what has previously *appeared to be true* by the representations of the principal, is actually true. 3. The representations must have been made directly to third persons, so as to have induced their action and to have created a *privity of contract* between

the principal and such person. 4. The fact that the particular act was not within the general delegation of power, must have been peculiarly within the knowledge of the principal. Very little discussion of this subject can be found in the earlier cases. It has been pressed upon the attention of modern jurists on account of the fact, that a large class of commercial business is performed through the medium of agents, especially that which is transacted by corporations. We are inclined to think that the doctrine itself is a modern one. The case which is usually cited, is *Herne vs. Nichols*, 1 Salkeld, 289. It was decided by Lord Ch. J. Holt at Nisi Prius: "In an action on the case for a deceit, the plaintiff set forth that he bought several parcels of silk for — silk; whereas it was another kind of silk, and that the defendant well knowing this deceit, sold it to him for — silk. On trial, upon not guilty, it appeared that there was no actual deceit in the defendant, who was the merchant, but that it was in his factor beyond sea; and the doubt was, if this deceit could charge the merchant; and Holt, Ch. J., was of opinion that the merchant was answerable for the deceit of his factor, though not *criminaliter*, yet *civiliter*; for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger, and upon this opinion the plaintiff had a verdict." From this meagre report of the case, its doctrine would seem quite doubtful as applicable to *agents in general*, because it has been distinctly held, after thorough discussion, that a mere power to sell does not of itself include a power to warrant: *Brady vs. Todd*, 9 C. B., N. S. 596-7, (1861;) and *a fortiori* does not include a power to misrepresent the qualities of the article. If the decision were made to

depend upon peculiar rules applicable to factors, it would become, as before stated, a question of usage. The true ground of the decision is, doubtless, indicated by Cresswell, J., in *Coleman vs. Riches*, 16 C. B. 117. He says: "*Herne vs. Nichols* was a case of misrepresentation, not fraud; *the defendant there adopted the act of the factor.*" When placed upon this ground, the decision can be readily understood. The subsequent recognition of the act was upon general principles, equivalent to a prior command. Otherwise, it would be plainly repugnant to the case of *Southern vs. How*, 2 Croke, 469-70-71. In that case, three counterfeit jewels were fraudulently sold by the factor of the defendant to the plaintiff in Barbary, for good jewels. Their value was £100, and were sold for £800. The plaintiff, regarding them as valuable, sold them to the King of Barbary, who, discovering their true character, imprisoned the plaintiff until he repaid the £800. It appeared that the defendant was not cognisant of the fraud of the factor. The Court inclined against the plaintiff, upon the ground that, as the master did not command the servant to conceal the character of the jewels, he shall not be charged if the servant exceeds his power. The doctrine of *Herne vs. Nichols*, if so qualified, is supported by the recent case of *Udell vs. Atherton*, 4 Law Times, N. S. 797. In that case, the principal authorized the agent to sell a log of mahogany. He fraudulently concealed a defect in the article, making at the same time a wilful misrepresentation in respect to it. The principal was innocent; but, as he *retained the benefit of the contract*, he was held liable in an action for deceit. The form of action was the same as in *Herne vs. Nichols*. The opinion of Wilde, B., is especially noticeable. Mr. Addison, in his recent work on torts, makes the same distinc-

tion. He says: "If a fraudulent act has been committed by the agent, and his act is adopted, and the principal takes the benefit of the contract, he is liable in an action for deceit;" (citing 1 Scott, N. R. 685;) "but if the principal repudiates the transaction, and the representation is not within the scope of an agent's ordinary authority, he is not liable." 10 C. B. 688. It is not intended to deny that the reason given by Lord Holt is a good one in a proper case, but only to question its applicability to the facts as they appear in *Salkeld*.

This class of authorities is evidently but of little weight in respect to the question of the responsibility of the principal where the act of the agent *imposes a burden upon him*, and he seeks, as soon as it is ascertained, to repudiate it, and where there is no settled usage to determine the agent's authority. As far as can be ascertained, this question has not been distinctly presented in any of the English cases. It came up recently (1857) in the State of New York in the case of *The Farmers' and Mechanics' Bank vs. The Butchers' and Drovers' Bank*, 16 N. Y. (2 Smith,) 125; S. C. 14 N. Y. (4 Kern,) 623. The teller of the latter bank was in the habit of certifying the checks of customers with the knowledge of the officers of the bank, and was provided with a book for the express purpose of keeping a memorandum of such checks. He was under express instructions not to certify when the drawer of the check had no funds. In direct violation of his instructions, he certified checks for a person who had no funds to his credit, and they came into the hands of an honest holder for value. Upon this state of facts the bank was held liable. The question was admitted for the purposes of the case to be, whether a *bona fide* holder for value of a negotiable

check, certified by a special agent, whose authority is limited to cases where the bank has funds of the drawer in hand, can enforce payment of the check, provided the bank has no such funds.

It will be observed, that the statement of the question excludes cases of the first class where *usage* is an element. No usage was pretended, and no argument drawn from cases of that sort can be relied upon. The Court laid very considerable stress upon that well-known rule of the law of partnership, that one of the parties may, notwithstanding express restrictions, bind the firm upon a contract made within the scope of his employment. It would, however, seem that the power of the individual partner belonged to the first class of cases. It is conferred, not by *special authority*, but by *law*. This view is taken by the Court of Common Pleas in England in a very recent case, (1861)—*Brady vs. Todd*, 9 C. B., N. S., 596-7—*Erle, C. J.*, delivering the opinion. "Partners have an authority conferred upon them by law in the same manner as masters of ships." p. 604. The Court expressly distinguishes this class of cases from those where the principal holds out that the agent has an authority, and induces another to deal with the agent on the faith of the representation.

Dismissing, then, the case of partners, masters of ships, &c., from view, from what source can the authority of the teller be derived? We think that the question of *negotiability* is not involved. It must ever be borne in mind, that the want of a *power to make an instrument*, being a question of capacity, is a defect which defeats it *at law*, and makes it utterly void. An instrument must at least *exist* before it can be negotiable. For this reason the important case of the *State of Illinois vs. Delafield*, 8 Paige, 527, S. C. in Error, 2 Hill, 159, is not

parallel. In that case an agent was restricted from selling certain negotiable bonds of the State of Illinois below par, or on credit. In violation of his instructions, he passed them to Delafield, who was cognisant of his breach of duty. Delafield was prevented by injunction from negotiating them, on the ground, that if they passed into the hands of an honest holder, the State must pay them. But in this case the bonds were *valid instruments, having been duly executed according to statute*. Even a wrong-doer might have transferred them to an honest purchaser without reference to the question of agency. But the question in the case of the Butchers' & Drovers' Bank was, whether the instruments were properly executed, or even existed at all.

Assuming, then, that the power of an agent to *create* an instrument must be measured in all cases by the same general principle, it would appear that the ordinary rules of the law of estoppel *in pais* must be invoked whenever it is sought to make a principal liable for the unauthorized acts of an agent, which he seeks to repudiate. The rule appears to be accurately stated in *North River Bank vs. Aymar*, 3 Hill, 270: "Whenever the very act of the agent is authorized by the terms of the power, that is, whenever, by comparing the act done by the agent, with the words of the power, the act is in itself warranted by the terms used, such act is binding on the constituent as to all persons dealing in good faith with the agent. Such persons are not bound to inquire into facts *aliunde*. The apparent authority is the real authority." Though the rule is enunciated as to *written* powers, its principle extends to other cases. Upon this theory the case of the Butchers' & Drovers' Bank was correctly decided. The Bank had authorized the teller to sign instruments *in form*, including the one in question, and

the purchaser acquired the check upon the faith and representation of the agent that it was included within the class of cases to which his authority extended. This principle would include all cases where the measure of authority was derived from the act of the principal, and another acted upon the representation. Thus, if there were *no rule of law or usage* limiting the authority of masters of ships to sign bills of lading, any person expressly authorized to execute them might bind his principal even if goods were not put on board, if a consignee acted upon the faith of the certificate that the goods had been shipped for his use by the consignor. See *Walter vs. Brewer*, 11 Mass. 104. In other words, the difference between *Grant vs. Norway* and the case of the Butchers' & Drovers' Bank, is simply this: in the one the authority is established by law, and as such cannot exceed the legal limit; in the other, the authority is directly conferred by act of the principal, and may extend so far as he pleases, or he may so clothe his agent with an apparent authority as to make him liable upon the rules applicable to estoppels *in pais*. Consequently, as new cases arise not affected by a well defined usage, the liability of the principal must be ascertained solely from the proper inferences to be drawn from his acts. If tellers of banks, for a long period, by a well settled usage, had authority merely as tellers to certify checks for customers only who had funds, we apprehend that the negotiability of the check would not protect even a bona fide purchaser when there were no funds. In fact, the very limitation by the usage gives the purchaser *notice of a want of authority*, and puts him upon inquiry, and upon that fact of implied notice the case of *Grant vs. Norway* turned. It remains to explain one or two cases which may appear to conflict with these views. The first

is *Coleman vs. Riches*, 16 C. B. 103. It appeared in that case that the plaintiff was a corn dealer, who bought corn which was delivered at the defendant's wharf by the vendors. The defendant, or his agent, was in the habit of giving receipts to the vendors, and it was the practice for the plaintiffs to pay such vendors for the corn stated in the receipts to have been delivered. The plaintiff's agent wilfully gave a receipt in a particular case to a person who had not delivered any corn to the plaintiff's use, and the plaintiff, in accordance with his usual practice, paid such supposed vendor. He then sued the defendant for the loss occasioned by the fraud of the agent. There was no evidence that there was any agreement between defendant and plaintiff, to give these receipts, but they appeared to have been mere memoranda between the defendant and the sellers. They were voluntary, and not designed to influence the plaintiff's conduct. On this ground the defendant was held not to be liable. Says Jervis, C. J.: "I do not see how Riches' (def't) *knowledge* that Coleman (pl'ff) was in the habit of paying the vendors on the production of his receipt acknowledging the delivery of the wheat, makes his giving such a receipt a representation to Coleman." p. 106. So Cresswell, J.: "I have looked carefully through the evidence, and have failed to discover anything from which we can infer any such course of dealing as would render the defendant liable to the plaintiff for the fraudulent representation of his agent. To do so we must assume that there was some contract between the parties, that a receipt should be given only upon the delivery of the wheat, in order that the plaintiff might be protected from paying for it before it was sent. There clearly was no evidence to warrant that. It may be true that Coleman was in the habit of paying for

the corn he purchased, upon the production of a receipt, and that Riches knew it. *But the defendant had nothing to do with the plaintiff's manner of conducting his business.* It leaves the case just as it was before." p. 119. The other Judges express similar views.

This case simply holds that an estoppel cannot arise unless the representation of the principal was made to the third party, so that he had a right to act upon it. It is quite apparent from the case, that if there had been an understanding between the parties that the receipts were to be given, the defendant would be liable for the fraud of his agent. Thus that able Judge, Williams, J., says in the same case: "If there had been evidence of an agreement between the plaintiff and defendant, that the latter should furnish the vendor with receipts on the delivery of the corn, upon the faith of which receipts the former should pay the price, I must confess I should have felt great difficulty in saying that the defendant would not be liable for the fraud of an agent, by means of which the plaintiff had been induced to part with his money on the faith of such delivery having taken place." The same idea pervades the opinion of the other Judges. Another case, which it may be well to distinguish, is that of the *Mechanics' Bank vs. New Haven Railroad Co.*, 3 Kernan, 599. A corporation had appointed a transfer agent, who was authorized, in the ordinary manner, to transfer existing shares of stock upon the books of the company, and to give the usual certificates to the transferee. In company with a confederate, he issued spurious certificates, purporting that his confederate was entitled to certain shares of stock. These were indorsed in blank, and pledged to the plaintiff, who made advances upon them in good faith. They were not transferred to him upon the

books of the corporation. The Court held that he acquired no right to any stock, and that the railroad corporation was not liable in damages for the fraudulent act of the agent.

The ground of this decision is, that the principal is not directly liable for the unauthorized act of the agent, and that the law of estoppel was not applicable, because no *representation was made to the plaintiff*. The transfer of the stock certificate furnished no evidence of a contract between the plaintiff and the defendant. In fact, the stock was not assignable *at law*, being a mere chose in action, but, by the peculiar rules of equity jurisprudence, the assignor was converted into a trustee for the assignee. It is one of the most elementary principles of equity law, that the assignee in such a case obtains no more right than the assignor, unless he can show a direct and distinct representation made to himself, by the person liable, upon the faith of which he made the purchase. As no such representation was shown, and as his assignor had no rights against the railroad company, he had none. The case is not inconsistent with the principles hitherto established. In this connection negotiability becomes important. It cannot aid an instrument which does not come either within the actual or apparent power of the agent. But when a negotiable instrument is *in form*, though not in fact, authorized, and the person who takes it, is privy to the agent's fraud, though he has himself no rights against the principal, he can make him liable by transferring it to an honest holder. The negotiation connects the representation of the principal with the holder, and makes him privy to a contract.

To sum up the conclusions attained; it has been shown that an agent cannot create an authority by his own representations, but that in all cases the conduct

of the principal is the subject of inquiry. The principal can become liable on two grounds: that of identity and of estoppel. Upon the ground of estoppel he may be liable either where there is a fixed usage respecting the agent's authority, or where an apparent power is conferred by direct authority. In the case of usage, the authority is limited by the usage itself. In an authority expressly or actually conferred, the inquiry must be whether the principal in form held out the agent, as having power to do the act in question, to the party who acted upon it, and whether the third person did accordingly act in good faith. If so, the principal is liable. But where the agent did the act without being held out as authorized, the principal is not liable, even though he knew the conduct of the agent. He is also not liable where the agent fraudulently creates an unauthorized chose in action in confederacy with another, and such other transfers the chose in action to an innocent assignee. This last proposition rests upon the peculiar rules of equity jurisprudence as applied to the assignment of choses in action.

Note 2. It may now be regarded as settled law, that bonds of a certain class are to be deemed negotiable. This is not true, of course, of ordinary bonds which are only assignable in equity. The doctrine of negotiability has been extended to exchequer bills, (4 Barn. & Ald. 1,) government bonds, (*Gorgier vs. Mieville*, 3 Barn. & C. 45; *Long vs. Smith*, 7 Bing. 284; *Delafield vs. State of Illinois*, 8 Paige, 527, s. 62, Hill, 159,) and other municipal bonds, such as those of towns and counties. *Bank of Rome vs. Village of Rome*, 19 N. Y., 5 Smith, 20; *Gould vs. The Town of Sterling*, *supra*; *contra*, *Deaman vs. Lawrence County*, 37 Penn., (1 Wright,) 353, (1860.) The Court in this case admits that its view is contrary to the current of American decisions.

The grounds upon which the Court insists, in order to establish its peculiar views, are, that such bonds are creatures of statute, lawful only by a special and extraordinary exercise of legislative omnipotence; that they usually recite the authority by which they exist; that they are called by the legislature "certificates of loans" or bonds, and that they are under seal. The only one of these reasons which appears very strong, is the last, and it is now perhaps too late to lay much stress upon it. Railroad bonds are likewise decided to be negotiable in *Morris Canal & Banking Co. vs. Fisher*, 3 Am. Law Register, 423, (N. Jersey); *White vs. Vermont & Mass. R. R. Co.*, 21 How. (U. S.) 575, and cases cited. It was held in this case, that when payable in blank, any bona fide holder could

fill them up, payable to himself or order. A contrary conclusion was arrived at in England. *Hibblewhite vs. McMorine*, 6 M. & W. 200; *Enthoven vs. Hoyle*, 13 C. B. (Ex. Cham.) 373. It was also decided in the last case, that the coupons, when detached from the bond, could not be deemed anything more than "tokens," unless they contained within themselves the elements of a promissory note. "The detached coupon (in that case) was nothing but a mere piece of paper, it is no bill of exchange, no promissory note, because it wants the essential character of a promissory note, seeing that there is not the name of any person mentioned in it as payee." They may undoubtedly be drawn so as to constitute, when detached, promissory notes.

T. W. D.

RECENT ENGLISH DECISIONS.

In the Court of Queen's Bench, 1862.

GALLIARD, APPELLANT, vs. LAXTON, RESPONDENT.¹

1. A warrant was issued by a justice of the county of C., directed to the constable of the township of N., and generally to all her Majesty's officers of the peace in and for the said county, commanding them, or some of them, forthwith to apprehend W. G., and convey him before two justices of C., to answer for not obeying a bastardy order for payment of money. The warrant was delivered to the superintendent of police, and had subsequently been in the possession of D., one of the police constables. Afterwards D. and S., police constables, while on duty in uniform, arrested W. G. under the warrant, but they had it not in their possession at the time of the arrest, it being at the station-house. W. G. was rescued by several persons, who assaulted the constables D. and S. Whereupon informations for the rescue and assault were laid against the parties by the constables; and at the hearing before justices the complaint as to the rescue was withdrawn, and that for the assault proceeded with, and the parties were convicted:
Held, that the conviction was bad, as the arrest by the constables was illegal, they not having the warrant in their possession at the time:
2. *Held* also, that the withdrawal of the information as to the rescue was no bar to proceeding with the complaint as to the assault.

¹ 5 Law Times, Rep. N. S., 835.